United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

ORIGINAL 75-7646

75-7699
To be argued by
Thomas A. Shaw, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-7699, 76-7011

B

P/S

GEORGE RIOS, et al.,

Plaintiffs-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
WITH REGARD TO ATTORNEYS' FEES

REPLY BRIEF FOR DEFENDANT-APPELLEE MECHANICAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GEORGE RIOS, et al., Plaintiffs-Appellants, -against- ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al., Defendants-Appellees.	:	Docket No. 75-7699

REPLY BRIEF FOR DEFENDANT-APPELLEE
MECHANICAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.

ISSUE PRESENTED

Having found that plaintiffs had shown "no specific instances of MCA discrimination," did the District Court properly find MCA not liable for any award of attorneys' fees?

STATEMENT OF THE CASE

A. The Instant Appeal

The instant appeal and cross-appeal are from an order of the District Court, entered on October 17, 1975, as to the award of attorneys' fees and costs, entered in accordance with Judge Bonsal's Opinion issued on June 27, 1975 (400 F. Supp. 993). On the basis of that Opinion, the Rios plaintiffs (cross-appellants, hereinafter referred to as "Rios") were awarded $50,000 in attorneys' fees plus $3,601.49 in costs, while the Government was allowed to recover $6,014.45 in costs (400 F. Supp. at 997-8). These awards were solely against Local 638. Local 638 has appealed both the award of and size of the fee, and the allowance of certain items of costs. Rios has cross-appealed on the ground that it should have been granted the full amount of attorneys' fees which it sought - $128,092.50, and the further ground that defendants Mechanical Contractors Association of New York, Inc. ("MCA") and the Joint Steamfitters Apprenticeship Committee ("JAC") should have been held liable for that award jointly with Local 638.

B. The Facts

The basic facts relevant to the issues raised by these appeals as to attorneys' fees are adequately reviewed in MCA's earlier brief as to back pay submitted on the companion appeal and to which this Court is respectfully referred (See pp. 3-11, MCA Back Pay Br.). Although MCA's earlier statement of the facts responds to all of the factual matters raised by Rios on this appeal, the following specific points need to be reemphasized in reply to Rios' brief.

1. The Government has never charged MCA with discrimination, and named MCA as a defendant solely "for the purposes of relief only pursuant to Rule 19(a)(1)" F.R.C.P. (A-111).

2. The Court below in effect subjected MCA to portions of its decree solely for the purpose of granting relief among the other parties, in accordance with Rule 19(a)(1) F.R.C.P. stating (A-616, 360 F. Supp. at 995):

> "Moreover, the participation of MCA in an affirmative action program is a necessity if the steamfitting industry is to correct the discriminatory effects of past employment practices."

3. Rios failed to prove any of its charges that MCA had been guilty of discrimination. The Court below found (A-616, 360 F. Supp. at 995-6):

> "Plaintiffs have shown no specific instances of MCA discrimination. Rather, plaintiffs have demonstrated only that there has been a lack of nonwhite employment in the industry generally and that, in consequence, the industry's referral practices must be changed."*

4. On the other hand, the Court below found that the plaintiffs had established egregious discrimination on the part of Local 638. Almost all of the time allegedly spent by the Rios' attorneys in this matter, beginning with the several proceedings seeking preliminary injunctions against Local 638 through the earlier appeals brought solely by Local 638 has been devoted to building the case against Local 638.

5. The Court below specifically denied any award of attorneys' fees against MCA stating (400 F. Supp. at 997):

> "The only other defendants who might be called upon to pay the attorneys' fees are MCA and the JAC. However, MCA, a non-profit trade association of certain of the contractors in the New York area, primarily acts for its employer members in collective bargaining negotiations with Local 638 and does not employ steamfitters

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*The Rios' brief at p. 13 distorts the last phrase in this quotation to suggest that the Court found that "MCA referral practices" required change. The Court made no finding, or even reference, to "MCA referral practices" since there was no evidence whatever that MCA has ever had any referral practice or function.

directly. After trial, the Court found that MCA's status as a proper party did not imply that it was 'responsible ipso facto for all the employment practices . . . found unlawfully discriminatory or that it is liable in damages to the plaintiffs,' and found that plaintiffs had shown 'no specific instances of MCA discrimination.' 360 F. Supp. at 995."

ARGUMENT

MCA WAS PROPERLY HELD NOT LIABLE FOR ANY COUNSEL FEES

A. The District Court, In The Sound Exercise of Its Discretion, Properly Denied Attorneys' Fees Against MCA

The basis for awarding attorneys' fees is statutory, and, by such statute's terms, discretionary.

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." (42 U.S.C. § 2000e-5(k); emphasis added).

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court indicated that the standard to be used in making such awards in Title VII cases is that applied in Title II cases, namely:

> "one who succeeds in obtaining an injunction under that Title [II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968); also Northcross v. Memphis Board of Education, 412 U.S. 426, 428 (1973).

The Court, in Moody, recognized the specific grant of discretion under the Act to the courts in invoking

any of its remedies, noting however (422 U.S. at 415-6):

> "The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and - owing to the structure of the federal judiciary - these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' United States v. Burr, 25 F. Cas. 30, 35 (CC Va. 1807) (Marshall, C.J.)."

Having determined to award such fees, the District Court clearly has broad discretion both in determining the amount of such fees and in apportioning the award of such fees among the various defendants, in much the same fashion as back pay liability is apportioned. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972); Williams v. General Foods Corp., 492 F.2d 399, 408-9 (7th Cir. 1974); Batiste v. Furnco Const. Corp., 503 F.2d 447, 451 (7th Cir. 1974); cert. den. 420 U.S. 928 (1975). If plaintiff is successful as to some issues and not others, he is only awarded fees as to the former and not the latter. Taylor v. Goodyear Tire and Rubber Co., 6 E.P.D. ¶ 8693 (D.C. Ala. 1973). And, even though the express statutory provisions of Title VII apply, they do not override, but merely qualify the general provisions of Rule 54(d), F.R.C.P.,

which grants the District Court considerable equitable discretion in awarding attorney's fees generally. 6 Moore's Federal Practice, ¶ 54.70(3).

The Court below expressly recognized these principles and exercised its informed judgment on the facts of the case, awarding $50,000 attorneys' fees to the National Employment Law Project, Rios' attorneys, chargeable solely to Local 638.

It is true that this sum was less than the sum attorneys requested, but Judge Bonsal in fixing the amount, stated (400 F. Supp at 997):

> "Under the circumstances here presented and considering the funds received by the Project from other sources, the Project will be awarded $50,000 in attorneys' fees for its services in the Rios action."

Judge Bonsal's reference to the "funds received by the Project from other sources" relates to the fact that the Project is almost entirely funded by the United States Office of Economic Opportunity ("OEO"). Although we contend infra that this funding precludes an award of attorneys' fees, we submit that at a very minimum the fact of such Government funding was properly used by Judge Bonsal as a factor in determining the amount of the award.

Another factor which should be considered in determining the amount of the award is that the Project attorneys largely duplicated the work of the Government attorneys in this case; the same relief almost certainly would have been granted in this action if the Rios suit had never been commenced. Cf. EEOC v. Local 638 . . . Local 28, Sheet Metal Workers, et al., ___ F.2d ___, Slip Op. 2481 (2d Cir. March 8, 1976).

Further in the sound exercise of discretion, Judge Bonsal held that only Local 638 was liable for attorneys' fees and costs, inasmuch as Local 638 was the only named defendant found to be in substantial violation of Title VII. As for MCA, he repeated his earlier holding that MCA was not found to be responsible for past discriminatory practices (360 F. Supp. at 995), and therefore should not be charged with any attorneys' fees and costs. 400 F. Supp. 993, 996-7 (S.D.N.Y. 1975).

The Supreme Court in Albemarle Paper Co. v. Moody, supra, in discussing appellate review of Title VII remedies, reiterated the long standing general rule that courts of appeals must recognize ". . . that the trial court will often have the keener appreciation of those

facts and circumstances peculiar to particular cases." 422 U.S. at 421-2. Here, Judge Bonsal has lived with this case and its parties since 1971, and more particularly has been deeply involved in the Affirmative Action Program, which he laid down, for several years since his original decree and prior to his back pay and attorneys' fees awards. Under such circumstances, his awards should be accorded great weight and disturbed only if they constitute a clear abuse of discretion.

No such abuse of discretion is remotely shown.

The Rios appellants argue merely that they are entitled to attorneys' fees because they were the "prevailing party" vis-a-vis MCA (p. 12, Rios Br.). Inasmuch as MCA was not held to have violated Title VII, Rios hardly "prevailed" as to MCA. Rios has cited no cases which directly or by analogy support its position that it is the "prevailing party" as against MCA in this instance. In fact, Rios has not cited a single case nor have we found any cases wherein an employer association such as MCA was held liable for attorneys' fees in a Title VII action.

Under the circumstances, Judge Bonsal's determination that MCA has no liability should be in all respects affirmed.

B. An Award Of Attorneys' Fees Is Inappropriate Given The Statute And Its Legislative Intent

The section under which attorneys' fees are sought makes such an award discretionary, except where the prevailing party is "the Commission [EEOC] or the United States" in which case an award of attorneys' fees cannot be allowed. (42 U.S.C. 2000e-5(k)).

All attorneys who represented the Rios plaintiffs were employed by the Project, pursuant either to a contract between the United States Equal Employment Opportunity Commission ("EEOC") and the Project or a grant to the Project by the OEO. (Letter, A-760; Par. 4, Affidavit of E. Richard Larson, sworn to October 26, 1973, hereinafter "Larson Aff."). It is further admitted that well over 90% of the funding for the Project's prosecution of this case came from the United States Government. (400 F. Supp. at 993; also Letter A-760; Larson Aff., A-949, 950). Obviously, the EEOC or the Government cannot be allowed to violate flagrantly a statutory prohibition by contracting with organizations or by retaining outside counsel, such as the Project, to prosecute such suits. To hold otherwise

would be to condone the circumvention of a clear statutory prohibition, in this case that defendants shall not be required to pay the attorneys' fees in any Title VII action which is brought (either directly or indirectly through outside counsel) by the United States. As the general principle has aptly been stated:

> ". . . the [Supreme] Court has held with invarying regularity that one may not do by indirection what is forbidden directly; one may not by form alone contradict the substance of a transaction." Wolman v. Essex, 342 F. Supp. 399, 415 (S.D. Ohio 1972).

Although Rios' attorneys have sought to support their claim by citing numerous cases, wherein attorneys' fees were awarded to non-profit organizations, some of which were supported in part by public funds - Federal and/or State - they have cited no instance, nor have we found any, where an organization which receives 93-97% of its funding from the Federal Government was granted attorneys' fees in accordance with 42 U.S.C. § 2000e-5(k).

Going beyond the strict statutory provisions, there are a couple of underlying rationales for allowing attorneys' fees, neither of which are present here. The expense of litigation, which might inhibit a person's assertion of his or her rights, was of no concern here because the Rios plaintiffs were under no

obligation to pay any attorneys' fees and will not do so (¶ 7, Larson Aff.). Awarding attorneys' fees to pay the actual expenses incurred is also unnecessary here because the expenses of Rios' counsel have already been paid.

It is obvious that where as here, the Government has provided direct funding for such lawsuits, with no obligation on the part of the individual plaintiffs to pay anything, the cited provision will not "encourage individuals injured by racial discrimination to seek judicial relief . . . ." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

Even in the absence of a plain statutory prohibition against awarding attorneys' fees in Government-financed litigation as is present here, courts have denied attorneys' fees where such funding was shown. In Gaddis v. Wyman, 336 F. Supp. 1225 (S.D.N.Y. 1972), the Legal Aid Society of Westchester County, which had successfully brought contempt proceedings against the state and county commissions of departments of social services, was denied attorneys' fees after it was disclosed that it received 89% of its funding from the OEO. In Woolfolk v. Brown,

358 F. Supp. 524 (E.D. Va. 1973), the court denied a motion for attorneys' fees by the same Project attorneys involved here, citing with approval the Gaddis decision for the proposition that "a compensatory award is not merited when the legal services expended are already provided for by public funding" (358 F. Supp. at 536).

If plaintiffs' attorneys are allowed attorneys' fees, the clear statutory limitation on such awards will be completely subverted inasmuch as the Rios action is in substance no different from an action brought directly by the Commission or the United States.

CONCLUSION

We submit that the Court below did not impose liability for attorneys' fees upon MCA because plaintiffs had shown "no specific instances of MCA discrimination," and that in so doing, it was clearly correct and should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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Plaintiff-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

etc.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DONALD L. PRICE being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, New York 10005, attorneys for Defendant-Appellee Mechanical Contractors Association of N.Y., Inc. in the above action.

On April 16, 1976 I served the annexed

REPLY BRIEF FOR DEFENDANT-APPELLEE

by depositing a true copy thereof in a sealed, postpaid envelope at the post office box maintained at 1 Chase Manhattan Plaza, New York, N. Y. 10005, addressed to the following:

Steven J. Glassman, Esq., United States Attorney's Office, Southern District of New York, Foley Square, New York, N.Y. 10007,
Richard Brook, Esq., Delson & Gordon, 230 Park Avenue, N.Y., N.Y. 10017

Sworn to before me this
16th day of April 1976

Kathleen Roche

KATHLEEN ROCHE
NOTARY PUBLIC, State of New York
No. 24-4525095
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Donald L Price

UNITED STATES COURT OF APPEALS
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-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

etc.

AFFIDAVIT OF SERVICE ON PERSON IN CHARGE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Chester Kowalski being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, attorneys for the Defendant-Appellee Mechanical Contractors Association of N.Y., Inc. in the above action.

On the 16th day of April, 1976, between the hours of 9:30 A.M. and 5:30 P.M., I served two copies of the annexed

REPLY BRIEF OF DEFENDANT-APPELLEE

on the attorney(s) listed below by delivering the same to and leaving the same with the person in charge of said office(s).

Marilyn Walters, Esq., Tufo, Johnston & Allegaert, 645 Madison Avenue, New York, New York 10022

Sworn to before me this 16th day of April 1976

Chester Kowalski

Kathleen Roche

KATHLEEN ROCHE
NOTARY PUBLIC, State of New York
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Certificate Filed in New York County
Commission Expires March 30, 1977